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No. 09-

09-124

IN THE

Supreme Court of the United States

CLARK A. MORRES,

Petitioner,

v.

DEER'S HEAD HOSPITAL CENTER, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Fourth Circuit affirmed the district court's finding that Congress failed to abrogate the states' Eleventh Amendment immunity in adopting the Emergency Medical Treatment and Active Labor Act ("EMTALA"), codified in 42 U.S.C. § 1395dd *et seq.* and that an internal grievance hearing addressing Petitioner's wrongful discharge accorded him a "name-clearing hearing" sufficient to satisfy the requirements of the Fourteenth Amendment. The Fourth Circuit's thinly supported decision, if generally adopted, would have dire consequences to the nation's healthcare system. Review by this Court is warranted to resolve issues left unaddressed by the courts.

Two questions are presented:

I. Did Congress effectively abrogate the states' Eleventh Amendment immunity as to retaliation claims brought under § 1395dd(i) of EMTALA, otherwise known as the "whistleblower" provision?

II. Does an "in house" grievance hearing immunize the employer from a liberty interest claim under the Fourteenth Amendment after the employer has disseminated false and stigmatizing charges about the employee?

LIST OF PARTIES

The parties to the proceeding before the United States Court of Appeals for the Fourth Circuit included Petitioner Clark A. Morres, M.D. ("Dr. Morres") and Respondents, Deer's Head Hospital Center ("Deer's Head"), and the Director of Deer's Head, Sandra K. Smith ("Ms. Smith").

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OPINION BELOW

The unreported opinion of the United States Court of Appeals for the Fourth Circuit, styled *Morres v. Deer's Head Hosp. Ctr.*, No. 08-1915 (4th Cir. May 4, 2009), holds that the United States District Court for the District of Maryland committed no reversible error in dismissing both counts of Petitioner's suit in *Morres v. Deer's Head Hosp. Ctr.*, No. 1:08-cv-00002-CCB (D. Md. July 25, 2008). *See* Appendices A - B.

STATEMENT OF JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

By unpublished *per curiam* opinion dated May 4, 2009, the Fourth Circuit affirmed the July 25, 2008 decision of the United States District Court for the District of Maryland. *See* Appendices A - B.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Title 42 United States Code, Section 1395dd.

Civil Enforcement – 42 U.S.C. § 1395dd(d)(2)(A).

> Any individual who suffers personal harm as a direct result of a participating hospital's violation of a requirement of this section may, in a civil action against the participating hospital, obtain those damages available for personal injury under the law of the State in which the hospital is located, and such equitable relief as is appropriate.

Whistleblower Protections – 42 U.S.C. § 1395dd(i).

A participating hospital may not penalize or take adverse action against a qualified medical person descried in section (c)(1)(A)(iii) or a physician because the person or physician refuses to authorize the transfer of an individual with an emergency medical condition that has not been stabilized or against any hospital employee because the employee reports a violation of a requirement of this section.

U.S. Constitution, Amendment XI.

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

42 U.S.C. § 1983 – Civil action for deprivation of rights.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in

> equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

Petitioner Clark A. Morres, M.D. was terminated from his employment as Medical Director of Respondent Deer's Head Hospital Center ("Deer's Head") on February 13, 2006. Petitioner began his tenure as Medical Director of Deer's Head, a hospital and nursing center owned and operated by the State of Maryland, in July of 2005. Soon into Petitioner's employment with Deer's Head, Petitioner discovered facts which led him reasonably to conclude that patients at Peninsula Regional Medical Center ("PRMC"), a local hospital, were being transferred to Deer's Head when their insurance benefits would no longer pay for their continued care at PRMC, but prior to the patients being stabilized. Although Petitioner objected, the Director of Deer's Head, Sandra K. Smith ("Ms. Smith"), directed that patients be accepted from PRMC when they were not sufficiently stabilized to be transferred to the lower level of care available at Deer's Head. In one instance, Petitioner discovered facts which led him reasonably to conclude that Ms. Smith overrode his

medical decision and accepted a patient who needed platelet transfusions not available at Deer's Head. The patient had to be returned to PRMC days later, where the patient died.

Petitioner repeatedly complained to Ms. Smith, a nurse by training, of these seemingly improper medical decisions regarding transfers. His repeated complaints resulted in retaliatory action against Petitioner *via* a series of untimely, pretextual performance evaluations. Petitioner protested what he believed to be Ms. Smith's false and contrived remarks on his evaluations and, in further protest of the ongoing improper activities, attempted to step down from the position of Medical Director. On February 7, 2006, Petitioner approached the personnel department of Deer's Head to request a voluntary demotion, which was denied. Petitioner was terminated approximately one week later on February 13, 2006. Although the basis for his termination was allegedly Ms. Smith's pretextual performance evaluations, the termination was, in actuality, a product of his complaints of noncompliance and fear he would alert the authorities to ongoing violations of the Emergency Medical Treatment and Active Labor Act ("EMTALA"), 42 U.S.C. § 1395dd *et seq.*, and other unlawful activities committed by Deer's Head and Ms. Smith.

After receiving notification of his termination, Ms. Smith had Petitioner ostentatiously escorted off of the premises by security. Shortly thereafter, Petitioner discovered that unfounded, negative comments placed by Ms. Smith in his evaluations were being circulated throughout the community, having been apparently

disclosed by her, or at her direction. Petitioner found himself unfairly stigmatized within his profession and, hence, unable to find suitable employment within the community. Ultimately, Petitioner was compelled to find reemployment on the West Coast.

On January 2, 2008, Petitioner brought suit against Deer's Head and Ms. Smith, averring that he had been terminated for making complaints of EMTALA violations. Petitioner amended his Complaint to add an additional cause of action, contending that, in firing him, the State had deprived him of his liberty interest under the Fourteenth Amendment by conducting his discharge in a manner that unduly stigmatized him and impaired his employability. Deer's Head and Ms. Smith collectively filed a Motion to Dismiss, arguing that the Eleventh Amendment bars EMTALA claims against Deer's Head and against Ms. Smith in her official capacity and that Petitioner's deprivation of liberty interest claim fails to allege any cognizable defect in the procedural due process afforded to Petitioner.

The District Court granted Respondents' Motion to Dismiss. Petitioner timely appealed the court's decision to the Fourth Circuit pursuant to 28 U.S.C. § 1391. The Court of Appeals rendered its decision on May 4, 2009, opining that the District Court committed no reversible error.

REASONS FOR GRANTING THE PETITION

Whether Congress abrogated the states' Eleventh Amendment immunity as to retaliation claims brought under 42 U.S.C. § 1395dd(i) of EMTALA (otherwise known as the "whistleblower" provision) is an important issue implicating the nation's healthcare and is an issue that remains unresolved by the courts.

Congress enacted EMTALA to address the problem of "patient dumping" in hospital emergency departments. Patient dumping refers to instances in which a hospital turns away indigent or uninsured persons seeking treatment so that the hospital will not have to absorb the cost of treating such persons. There has been much judicial interpretation of EMTALA, but no court has addressed the issue of whether a physician may bring a claim against a state-owned or operated hospital under the whistleblower provision of the statute. The existing caselaw is inapposite to this novel issue. The Fourth Circuit, in its cursory review of the case, misapplied the common law surmising that 11th Amendment immunity bars *all* EMTALA claims against state-owned hospitals. Review is warranted to distinguish the issue and to resolve any conflicts in the law that are sure to arise in light of the court's blanket statement that 11th Amendment immunity bars *all* EMTALA claims against state-owned and operated hospitals.

Likewise, review by this Court is also necessary to resolve the issue of whether a plaintiff must allege that he was denied a "name-clearing hearing" in order to state a liberty interest claim. The Fourth Circuit's unreported opinion is a departure from its decision in *Sciolino v. City of Newport News*, 480 F.3d 642 (4th Cir. 2007) and is at odds with the notice pleading system of the Federal Rules.

Review of this case is essential to resolve these unanswered questions and to protect this nation's healthcare system. Physicians can see their professional careers destroyed if they dare to challenge a hospital's practices. When a whistleblowing physician is retaliated against, it threatens not only the physician's livelihood, but the care of all patients.

I. REVIEW IS WARRANTED TO RESOLVE WHETHER CONGRESS ABROGATED THE STATES' ELEVENTH AMENDMENT IMMUNITY AS TO RETALIATION CLAIMS BROUGHT UNDER THE "WHISTLEBLOWER" PROVISION OF EMTALA, AN ISSUE LEFT UNADDRESSED BY UNITED STATES' COURTS.

A. Congress unequivocally expressed an intent to abrogate Eleventh Amendment immunity for whistleblower claims against state-owned and operated hospitals.

EMTALA imposes on "participating hospitals" duties to provide to persons presented for treatment "an appropriate medical screening . . . to determine whether or not an emergency medical condition . . . exists," and (2) to stabilize the condition or, if medically warranted, to transfer such persons to other facilities. *See* 42 U.S.C. § 1395dd(a)-(c); *Williams v. United States*, 242 F.3d 169, 173-74 (4th Cir. 2001). EMTALA was enacted to fill a lacuna in traditional state tort law by imposing on hospitals a legal duty, which common law did not recognize to provide emergency care to all patients. It was enacted in response to a growing concern hospitals were "dumping" patients who were unable to pay. *See Brooks v. Maryland Gen. Hosp., Inc.*, 996 F.2d 708, 714-15 (4th Cir. 1993).

To comply with the Act, hospitals must perform their duties uniformly, regardless of whether the persons arriving in the emergency rooms are insured, otherwise able to pay, or unable to pay. *Williams*, 242 F.3d at 174. EMTALA provides for civil penalties against a "participating hospital" that violates any provision of the Act and against "any physician who is responsible for the examination, treatment, or transfer of any individual in a participating hospital." § 1395dd(d)(1)(B); 1395dd(e)(2) (defining "participating hospital" as a hospital that has entered into a provider agreement under § 1395cc). "Any individual who suffers personal harm as a direct result of a participating hospital's violation of a requirement," may initiate a civil action against a participating hospital. *Id.* § 1395dd(d)(2)(A).

In an effort to protect physicians who try to diminish patient risk and improve patient care by complying with EMTALA, Congress included a whistleblower provision, which provides, in pertinent part, that

> [a] participating hospital may not penalize or take adverse action against . . . a physician because the . . . physician refuses to authorize the transfer of an individual with an emergency medical condition that has not been stabilized or against any hospital employee because the employee reports a violation of a requirement of this section.

§ 1395dd(i). It is pursuant to this subsection that Petitioner brought suit against Deer's Head as a "participating hospital" in the Medicare Program.

The catalyst for the enactment of EMTALA was an urgent desire to protect patients who were denied emergency room treatment because of their indigent or uninsured status. *See* H.R. Rep. No. 99 241 pt. 1 at 27 (1986) *reprinted in* 1986 U.S.C.C.A.N. 579, 605. Patently, state hospitals are the primary providers of medical services to indigent and uninsured patients and are the institutions in which those patients are most likely to be treated. As revealed by the official House of Representatives and Senate reports, the intent of EMTALA was an anti-discrimination statute:

> The Committee is greatly concerned about the increasing number of reports that hospital emergency rooms are refusing to accept patients with emergency conditions if the patient does not have medical insurance. . . .
>
> The Committee wants to provide strong assurance that pressures for greater hospital efficiency are not to be construed as license to ignore traditional community responsibilities and loosen historical standards.

H.R. Rep. No. 99-241, pt. 2, at 227 (1986), reprinted in U.S.C.C.A.N. 605.

Although legislative history cannot supply the necessary "unequivocal expression," Congress has made its intention to abrogate the states' immunity unmistakably clear through the statutory text's enforcement and whistleblower provisions.

B. District Court holdings from the First and Tenth District addressing the states' waiver of immunity with respect to the enforcement provision of EMTALA fail to resolve the issue presented.

Despite the unambiguous language of EMTALA, District Courts from the First and Tenth Circuit have found that EMTALA does not contain an express and unequivocal waiver of immunity and that any intent by Congress to abrogate the states' Eleventh Amendment immunity would be unavailing, as Congress does not have the power to abrogate immunity acting pursuant Article I of the Constitution. *See e.g., Ward v. Presbyterian Healthcare Center Servs.*, 72 F. Supp. 2d 1285 (D.N.M. 1999); *Cheromiah v. United States*, 55 F. Supp. 2d 1295, 1300-01 (D.N.M. 1999); *Lebron v. Ashford Presbyterian Comm. Hospital*, 975 F. Supp. 407, 409-10 (D.P.R. 1997); *Perez-Bourdon v. Commonwealth of Puerto Rico*, 951 F. Supp. 22, 24 (D.P.R. 1997); *Vazquez-Morales v. Estado Libre Asociado de Puerto Rico*, 967 F. Supp. 42, 45-46 (D.P.R. 1997). These decisions narrowly considered the issue of whether a patient may bring suit against a state entity under EMTALA's enforcement provision. No United States' court has addressed the issue of whether a physician may bring suit against a hospital owned by the state because of an improper termination of his employment as a direct consequence of his complaints about perceived violations of EMTALA. There is a determinative distinction between suits brought as an enforcement action seeking relief for a substantive EMTALA violation and those brought under EMTALA's whistleblower provision.

C. Unlike the enforcement provision of EMTALA, Congress acted pursuant to § 5 of the Fourteenth Amendment in enacting the whistleblower provision.

In passing EMTALA, the legislative aims were to assure adequate medical care to all persons regardless of whether they had health insurance and to prevent "patient dumping." *Ward*, 72 F. Supp. 2d at 1291. While these rights are important and "proper Article 1 concerns, they are not rights which are secured by the Fourteenth Amendment." *See Vazquez-Morales*, 967 F. Supp. at 46 (holding that the "Social Security Act - of which the Medicare scheme, including EMTALA, forms a part - is an exercise of Congress' powers under Article I to tax and to regulate interstate commerce and, [t]herefore, even if it so intended, Congress could not have abrogated the states' Eleventh Amendment immunity by enactment of EMTALA").

Congress may act pursuant to two legislative powers in enacting legislation. *See Brzonkala v. Virginia Polytechnic Institute and State University*, 169 F.3d 820, 828-29 (4th Cir. 1999) (where the United States intervened to defend the constitutionality of the Violent Crime Control and Law Enforcement Act of 1994, 42 U.S.C.A. § 13981, under the Commerce Clause *and* Section 5 of the Fourteenth Amendment, the two sources of power expressly invoked by Congress in enacting § 13981). In incorporating the whistleblower provision into the Act, Congress sought to enforce the Due Process Clause of the Fourteenth Amendment and did not act pursuant to Article I.

The whistleblower provision is responsive to and intended to prevent unconstitutional behavior. It is designed to curb retaliation against physicians who refuse to authorize the transfer of an individual with an emergency medical condition that has not been stabilized or against any hospital employee who reports a violation, thereby depriving him or her of liberty and/or property without due process of law.

In examining whether legislation is congruent and proportional, the courts consider whether Congress had evidence of a pattern of constitutional violations on the part of the states. *Nevada Dep't of Human Resources v. Hibbs*, 538 U.S. 721, 729 (2003). This provision is and was necessary to address retaliation in the form of irreversible defamation, unwarranted suspension, or termination of employment in the critical area of health care, and to prevent a chilling effect on physicians who seek to improve the quality of all patient care. The remedial measures contained in the whistleblower provision represent a congruent and proportional response to this demonstrated pattern of due process violations. *Id.*; *see also City of Boerne v. Flores*, 521 U.S. 507, 520 (1997) (holding that "[t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end").

On its face, EMTALA unambiguously waives the states' Eleventh Amendment immunity through the enforcement *and* whistleblower provisions. To read the Act otherwise, would lead to an absurd *non sequitur*. *In re Bateman*, 515 F.3d 272, 277 (4th Cir. 2008). The perverse result of the confluence of EMTALA and

Eleventh Amendment immunity is that a statute specifically enacted for the protection of the indigent and uninsured affords no protection against the hospitals at which they will most likely be treated.

II. REVIEW IS WARRANTED TO RESOLVE WHETHER A PLAINTIFF MUST ALLEGE THAT HE WAS DENIED A "NAME-CLEARING HEARING" TO STATE A LIBERTY INTEREST CLAIM.

As a direct and proximate result of the egregious misconduct on the part of Deer's Head and Ms. Smith, Petitioner was irrevocably damaged in his reputation, character, and standing in the community. Due to the wrongful deprivation of his liberty interest, Petitioner, pursuant to 42 U.S.C. § 1983, seeks a remedy for the violations of his federal rights committed by persons acting under color of state law.

Petitioner's claim that he was deprived of his liberty interest under the Due Process Clause to the Fourteenth Amendment arises from the combination of two distinct rights protected by the Amendment: "(1) the liberty to engage in any of the common occupations of life; and (2) the right to due process [w]here a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him." *Sciolino v. City of Newport News*, 480 F.3d 642, 646 (4th Cir. 2007), *cert. denied*, 128 S. Ct. 805 (2007) (internal citations and quotations omitted); *see also Paul v. Davis*, 424 U.S. 693, 701 (1976) (explaining that an individual's liberty interest in his reputation is only sufficient "to invoke the procedural protection of the Due Process Clause," if combined with "some more tangible [interest] such as employment").

A. The Fourth Circuit's opinion is a departure from its decision in *Sciolino v. City of Newport News*, 480 F.3d 642 (4th Cir. 2007) and is in conflict with the fundamental principle of pleading.

To state this type of liberty interest claim, Petitioner must allege that the charges against him (1) placed a stigma on his reputation; (2) were made public by the employer; (3) were made in conjunction with his termination; and (4) were false. *Sciolino*, 480 F.3d at 646. Nowhere in *Sciolino* does the Fourth Circuit opine that, to state a liberty interest claim under the Due Process Clause, a plaintiff must allege that he or she was denied a hearing. Petitioner sufficiently pled each of the four elements, consistent with *Sciolino* and the fundamental principle of pleading, which requires a short and plain statement of his claim. Fed. R. Civ. P. 8(a). The heightened pleading standards called for by the lower court deviate from the principle of notice pleading that is the animating spirit of the Federal pleading rules.

Notice pleading rests on the principle that the defendant have fair notice of what a plantiff's claim is and the grounds upon which it rests. Rule 8 of the Federal Rules of Civil Procedure provides that "[p]leadings must be construed so as to do justice." Fed. R. Civ. P 8(e). Rule 8 requires only a short and plain statement of the claim showing that the pleader is entitled to relief, in order to give the defendant fair notice of what the claim is and the grounds upon which it rests. Petitioner has made sufficient allegations to put Ms. Smith on notice of the claims being asserted. Under

the Federal Rules, that is enough: Petitioner need only plead his claims and is under no obligation to plead supporting factual details. *Edwards v. City of Goldsboro*, 178 F3d. 231, 245 (4th Cir. 1999).

In accordance with the well-established standard of Rule 12(b)(6), a court must assume the truth of Petitioner's allegations and draw all inferences in Petitioner's favor. The Fourth Circuit ignored the well-articulated standard of Rule 12(b)(6) and assumed without deciding that, even if Petitioner's allegations were true, his claim would ultimately fail because Petitioner was allowed a hearing in which he challenged his termination. Compounding its error, the Fourth Circuit made a factual decision that the hearing before the Department of Health and Mental Hygiene, in which Petitioner challenged his termination, was a "name-clearing hearing."

In *Sciolino*, the Fourth Circuit held that to meet the public disclosure requirement, the Due Process Clause requires that the employee allege, and ultimately prove that his former employer has a practice of releasing personnel files to all inquiring employers or that, although the employer releases personnel files only to certain inquiring employers, he intends to apply to at least one of those employers. 480 F.3d at 650. This standard protects the employee's constitutional liberty interests, but does not interfere with the employer's personnel administration. *Id.* "It imposes no 'enormous costs' because an employer need only grant a name-clearing hearing if it will make false damaging charges about a former employee available to those likely to request the information, *e.g.*, future employers to whom

the employee will apply." *Id.* (internal citation omitted). In these situations, the constitutional harm "is not the defamation itself; rather it is the denial of a hearing at which the dismissed employee has an opportunity to refute the public charge." *Id.* at 649 (internal quotations omitted).

For employers to insulate themselves from liability with respect to the handling of employees' personnel files, "employers must either refrain from memorializing false and stigmatizing charges while dismissing an employee; *or*, if they do level such charges, provide a name-clearing hearing; *or*, if they do not want to provide this opportunity, keep the false stigmatizing allegations private." 480 F.3d at 650 n.6. Petitioner alleges that Ms. Smith neither refrained from memorializing false and stigmatizing charges, nor kept those charges private.

More importantly, in reaching the holding in *Sciolino* that an employee must allege, and ultimately prove, a likelihood that prospective employers or the public at large will inspect the file, the Fourth Circuit quickly dismissed requiring an allegation of actual dissemination, opining that, if it were required, "the information would have already been communicated to a potential employer, the employee's job opportunities foreclosed, and his reputation damaged *before* any possibility of a name-clearing hearing." *Id.* at 649. This is exactly what happened to Petitioner. Not only was the unfounded, negative information communicated by Ms. Smith to potential employers, it was also circulated throughout the entire professional community. Within this context, Petitioner's "name-clearing hearing" failed to serve the purpose of fostering future employability

and, hence, fails to remedy the constitutional harm already endured.

The unjustified acts and statements made by Ms. Smith, both within Deer's Head and externally, sufficiently damaged Petitioner's "reputation and standing in the community as to foreclose his freedom to take advantage of other economic opportunities." *See Jackson v. Long*, 102 F.3d 722, 730 (4th Cir. 1996). Petitioner was unable to find suitable reemployment, both public and private, within the vicinity of his home. He was compelled to relocate to the West Coast, far from the region in which he had lived his entire life, to obtain re-employment.

As Harvard Professor Alan Dershowitz stated, "Physicians who are entrusted with the care of their patients can see their professional careers destroyed if they dare to challenge a hospital's practices. When a 'whistleblowing' physician is retaliated against, it threatens not only the physician's livelihood, but the care of all patients." *See* Dr. Gil Mileikowsky & Bartholomew Lee, *How to Protect Physician Whistleblower – Patient Advocates – From Retaliation to Benefit Patients*, available at http://www.peerreview.org/whistleblowers/new_page_1.htm (last visited June 17, 2009). Physicians, such as Petitioner, who speak out often suffer irreversible damage to their reputation and standing in the community. "These physicians may or may not have done anything wrong, and may well have simply done too many things right for the comfort of some." *Id.* Due Process allows Petitioner to restore his reputation, character, and standing in the community, while also reversing the chilling effect on physicians who speak out in the sake of patient care.

CONCLUSION

For all of foregoing reasons, Petitioner respectfully requests that the Supreme Court grant review of this matter.

Respectfully submitted,

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APPENDIX

APPENDIX A — PER CURIAM OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT FILED MAY 4, 2009

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 08-1915

Clark A. MORRES, M.D.,

Plaintiff - Appellant,

v.

DEER'S HEAD HOSPITAL CENTER; SANDRA SMITH, Individually and in her Official capacity,

Defendants - Appellees.

Appeal from the United States District Court for the District of Maryland, at Baltimore.
Catherine C. Blake, District Judge.
(1:08-cv-00002-CCB)

Submitted March 13, 2009 Decided May 4, 2009

Before NIEMEYER, MICHAEL, and DUNCAN, Circuit Judges.

Appendix A

PER CURIAM:

Clark A. Morres, M.D., appeals the district court's order granting Defendants' Fed.R.Civ.P. 12(b)(6) motion to dismiss his civil action for failure to state a claim upon which relief could be granted. We have reviewed the record and find no reversible error. Accordingly, we affirm. *See Morres v. Deer's Head Hosp. Ctr.*, No. 1:08-cv-00002-CCB (D. Md. July 25, 2008). We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED

APPENDIX B — MEMORANDUM OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND FILED JULY 25, 2008

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

Civil No. CCB-08-2

CLARK A. MORRES

v.

DEER'S HEAD HOSPITAL CENTER, et al.

MEMORANDUM

Plaintiff Clark A. Morres ("Dr.Morres") has sued Deer's Head Hospital Center ("Deer's Head") and Sandra Smith ("Ms.Smith") for violations of the Emergency Medical Treatment and Active Labor Act ("EMTALA"), 42 U.S.C. § 1395dd *et seq.* , and constitutional violations. The defendants have filed a motion to dismiss. The issue has been fully briefed and no hearing is necessary. *See* Local Rule 105.6. For the reasons articulated below, the defendants' motion will be granted.

BACKGROUND

From July 2005 to February 2006, Dr. Morres served as the Medical Director of Deer's Head Hospital Center, a hospital and nursing center owned and operated by the State of Maryland. Dr. Morres claims that shortly

into his tenure at Deer's Head, he "discovered facts which led him reasonably to conclude that patients at Peninsula Regional Medical Center . . . were being transferred to Deer's Head when their insurance benefits would no longer pay for their continued stay at P[eninsula], but prior to the patients being fully stabilized." (First Amended Compl. ¶ 7.) Dr. Morres alleges that Ms. Smith, the Director of Deer's Head, instructed the staff to accept these patients even though they had not yet been stabilized. Dr. Morres complained about these transfers to Ms. Smith, and charges that in return he was fired. He alleges that Ms. Smith retaliated against him "via a series of untimely, pretextual performance evaluations." (*Id.* at ¶ 11.)

Dr. Morres is suing Deer's Head and Ms. Smith for violations of EMTALA which "caused Dr. Morres to suffer personal harm as a direct result thereof," and for depriving him of a liberty interest in his employment, resulting in damage to his reputation, character and standing in the community. Deer's Head and Ms. Smith have filed a motion to dismiss claiming, among other things, that the Eleventh Amendment bars the claims against Deer's Head and against Ms. Smith in her official capacity, that EMTALA does not establish a cause of action against hospital administrators, and that Dr. Morres's complaint does not state a claim against Ms. Smith for violation of due process.

Appendix B

ANALYSIS

"The purpose of a Rule 12(b)(6) motion is to test the sufficiency of a complaint; importantly, a Rule 12(b)(6) motion does not resolve contests surrounding the facts, the merits of a claim, or the applicability of defenses." *Edwards v. City of Goldsboro,* 178 F.3d 231, 243 (4th Cir.1999) (internal quotation marks and alterations omitted). When ruling on such a motion, the court must "accept the well-pled allegations of the complaint as true," and "construe the facts and reasonable inferences derived therefrom in the light most favorable to the plaintiff." *Ibarra v. United States,* 120 F.3d 472, 474 (4th Cir.1997). To survive a motion to dismiss, a complaint must "in light of the nature of the action ... sufficiently allege [ ] each element of the cause of action so as to inform the opposing party of the claim and its general basis." *Chao v. Rivendell Woods, Inc.,* 415 F.3d 342, 348 (4th Cir.2005). Following the Supreme Court's ruling in *Bell Atlantic Corp. v. Twombly,* 127 S.Ct. 1955, 1965 (2007), "[f]actual allegations must be enough to raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." "Once a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint." *Id.* at 1969 (quoted in *Goodman v. Praxair,* 494 F.3d 458, 466 (4th Cir.2007)). Moreover, the "plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Id.* at 1964-65.

Appendix B

EMTALA requires hospitals to provide certain types of care to any individual who presents himself to the hospital with an emergency medical condition. 42 U.S.C. § 1395dd(b)(1). Hospitals with emergency departments are required to screen arriving patients to determine whether such an emergency condition exists. *Id.* § 1395dd(a). Depending on the hospital's capabilities, the facility must either provide "such further medical examination and such treatment as may be required to stabilize the medical condition," or arrange for transfer to another medical facility. *Id* § 1395dd(b). Absent certain exceptions, a hospital may not transfer an individual with an emergency condition until that patient has been stabilized. *Id.* § 1395dd(c).

The Act provides for civil penalties against a "participating hospital" that violates the statute and against "any physician who is responsible for the examination, treatment, or transfer of an individual in a participating hospital." *Id.* § 1395dd(d)(1)(B). "Any individual who suffers personal harm as a direct result of a participating hospital's violation of a requirement of this section" may initiate a civil action against a participating hospital. *Id.* § 1395dd(d)(2)(A). The statute also provides protection for whistleblowers, stating that a participating hospital "may not penalize or take adverse action against a qualified medical person described in subsection (c)(1)(A)(iii) or a physician because the person or physician refuses to authorize the transfer of an individual with an emergency medical condition that has not been stabilized or against any

hospital employee because the employee reports a violation of a requirement of this section." *Id.* § 1395dd(e)(i).

Deer's Head and Ms. Smith first argue that the Eleventh Amendment bars the EMTALA claims against Deer's Head and against Ms. Smith in her official capacity. The Eleventh Amendment establishes that states may not be sued by private individuals in federal court except in two situations: after consent by the state, or under an abrogation of state sovereign immunity by Congress acting pursuant to a valid exercise of its power. *College Savings Bank v. Florida Prepaid,* 527 U.S. 666, 670 (1999). Additionally, "[s]uits against state officials in their official capacity [ ] should be treated as suits against the State." *Hafer v. Melo,* 502 U.S. 21, 25 (1991) (citing *Kentucky v. Graham,* 473 U.S. 159, 166, 105 S.Ct. 3099, 87 L.Ed.2d 114 (1985)). Deer's Head, which is owned and run by the Maryland Department of Health and Mental Hygiene, is an agency of state government, and Ms. Smith is a state official. There is no indication here, nor does Dr. Morres argue in his reply, that Maryland has issued an express and unequivocal waiver of its state sovereign immunity, as would be required under *Florida Prepaid,* 527 U.S. at 680-81.

Instead, Dr. Morres claims that EMTALA's retaliation provision constitutes a valid abrogation of state sovereign immunity. (Pl's Resp. Mot. Dismiss 3.) This does not appear to be the case. To be valid, the congressional intent to abrogate state sovereign immunity must be clearly expressed in the language of

the statute, *Seminole Tribe*, 517 U.S. at 55, and Congress must have acted pursuant to the enforcement authority granted it by section 5 of the Fourteenth Amendment, *id.* at 59. Legislation properly enacted under section 5 "must exhibit 'congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.'" *Nevada Dep't of Human Resources v. Hibbs*, 538 U.S. 721, 728 (2003) (quoting *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997)). The court must consider "whether Congress had evidence of a pattern of constitutional violations on the part of the States." *Id.* at 729.

Here, the language of EMTALA does not support Dr. Morres's argument that the statute validly abrogates state sovereign immunity; this is true for both the enforcement and whistleblower provisions. A general authorization for suit in federal court is not the type of "unequivocal expression of congressional intent" that is sufficient to abrogate sovereign immunity. *See Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 246 (1985). Under *Atascadero*, the "mere receipt of federal funds cannot establish that a State has consented to suit in federal court;" absent a clear intent to condition funding on a waiver of sovereign immunity, the state's decision to participate in federal programs does not subject the state to suit in federal court. *Id.* at 246-47. Although Congress undoubtedly intended to create a federal cause of action for EMTALA violations, there is no indication in the statute that it intended to provide specifically for such suits against

states. *See Ward v. Presbyterian Healthcare Services*, 72 F. Supp. 2d 1285, 1290 (D.N.M.1999); *Vazquez Morales v. Estado Libre Asociado*, 967 F. Supp. 42, 45 (D.P.R. 1997).

Even assuming the statute contained such an unequivocal expression, EMTALA was not enacted pursuant to Congress's section 5 powers. EMTALA forms part of the federal government's Medicare program, which in turn is part of the Social Security Act. The Social Security Act was enacted pursuant to Congress's Article I powers of taxation and regulation of interstate commerce. *Vazquez Morales*, 967 F.Supp. at 46. To avoid this problem, the plaintiff appears to contend that the retaliation (though not the enforcement) provision of EMTALA was enacted in order to remedy some sort of constitutional violation.[1]

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1. In support of this proposition, Dr. Morres cites *Crumpacker v. Kansas Dep't of Human Resources*, 338 F.3d 1163 (10th Cir.2003). That case deals with a former employee's Title VII sex discrimination and retaliation claims against her state employer, and holds that Congress properly exercised its section 5 authority in enacting the retaliation provision of Title VII. In coming to that conclusion, however, the Tenth Circuit discussed the then-recently decided *Nevada Dep't of Human Res. v. Hibbs*, 538 U.S. 721 (2003), in which the Supreme Court held that Congress could validly abrogate state sovereign immunity when it acted to correct certain gender-based discrimination, because gender discrimination merited heightened scrutiny. *Crumpacker* is inapposite; EMTALA does not deal with the type of discrimination that warrants a closer judicial review, and the "congruence and proportionality" test is thus not met.

(See Pl's Resp. at 3 n. 1.) "The purpose of EMTALA is to assure adequate medical care to all persons regardless of whether they have health insurance, and to prevent 'patient dumping.' Although the rights created by EMTALA are important and are 'proper Article I concerns,' they are not rights which are secured by the Fourteenth Amendment." *Ward*, 72 F. Supp. 2d at 1291 (internal citations omitted). If the rights created under EMTALA are not themselves based in the Fourteenth Amendment, it is unclear how an anti-retaliation provision protecting the exercise of those rights could be enacted pursuant to section 5 authority.

Because EMTALA does not contain an abrogation of state sovereign immunity, and because the state does not appear to have waived its immunity from suit, the claims against Deer's Head and against Ms. Smith in her official capacity will be dismissed.

The defendants also argue that the EMTALA claim (Count I) against Ms. Smith in her individual capacity must be dismissed, because EMTALA does not create a cause of action against hospital administrators. Under EMTALA, civil suits must be brought against the "participating hospital," which is defined as "a hospital that has entered into a provider agreement under section 1395cc of this title." 42 U.S.C. § 1395dd(e)(2). EMTALA does not permit an individual to bring a civil suit for damages against an individual physician. *See Baber v. Hospital Corp. of America*, 977 F.2d 872, 877 (4th Cir. 1992) (noting that EMTALA's legislative history made it clear that "Congress intentionally

limited patients to suits against hospitals," and listing other cases in accord). Indeed, the statute allows an action against an individual physician only "by the Department of Health and Human Services to bar his participation in Medicare programs and/or to seek administrative sanctions in the form of civil monetary penalties." *Id.* The statute does not establish a cause of action against hospital administrators, and Count I against Ms. Smith in her individual capacity must be dismissed.

Finally, the defendants argue that Count II, which is described by Dr. Morres as a "deprivation of liberty interest under the due process clause," must be dismissed because it fails to allege any defects in the procedural due process afforded to Dr. Morres. In the complaint, Dr. Morres claims that the defendants "gave rise to the appearance and impression Plaintiff had been guilty of misconduct, incompetence, poor performance and/or negligence." (First Amended Compl. 22.) Dr. Morres cites Ms. Smith's decision to have him escorted off the premises by security when he was terminated and "unfounded, negative comments placed by Ms. Smith in his evaluations" that Ms. Smith allegedly had disclosed to the public. Even taking Dr. Morres's allegations as true, there is no due process violation claimed here. In situations where a former employee is challenging the dissemination of potentially damaging information, "the constitutional harm 'is not the defamation' itself; rather it is 'the denial of a hearing at which the dismissed employee has an opportunity to refute the public charge.' " *Sciolino v. City of Newport*

News, 480 F.3d 642, 649 (4th Cir. 2007) (quoting *Cox v. N.Va. Transp. Comm'n*, 551 F.2d 555, 558 (4th Cir. 1976). As the defendants point out, Dr. Morres was allowed a hearing, in which he challenged his termination. (*See* Def's Mot. Dismiss First Amended Compl., Ex. 1.)

For the foregoing reasons, defendants' Motion to Dismiss will be granted. A separate Order follows.

July 25, 2008
Date

/s/
Catherine C. Blake
United States District Judge